Case No. 48723-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY JUVENILE DETENTION OFFICERS' GUILD,

Respondents

v.

KITSAP COUNTY,

Appellant.

RESPONDENT'S OPENING BRIEF

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I. INTRODUCTION

This administrative review case arises from an unfair labor practice ("ULP") complaint filed by Complainant/Respondent Kitsap County Juvenile Detention Officers' Guild ("Guild") against Appellant Kitsap County ("County") in front of the Public Employment Relations Commission ("PERC"). The complaint centered on whether the County had breached its duty of good faith bargaining and interfered with the Guild's rights through a series of actions taken while the parties negotiated for an initial collective bargaining agreement.

A multi-day hearing in this matter was conducted in front of Examiner Dianne Ramerman, who upon receiving all the evidence determined that the County had committed a ULP violation by failing to send representatives to the bargaining table with sufficient authority to engage in meaningful bargaining with the Guild, which unlawfully inhibited and frustrated bargaining. The County filed a timely notice of appeal to the Commission; however, it failed to submit its appeal brief consistent with PERC regulations, and as a result the Commission refused to consider any briefing from the County. Despite the absence of any briefing, the Commission took it upon itself to conduct a full *de novo* review of the factual record, with almost no reference to the Examiner's factual findings and credibility determinations, and in turn vacated the Examiner's Order. The Guild filed a petition for review in Thurston County Superior Court under the Administrative Procedures Act ("APA"),

seeking to overturn the Commission's decision based on the Commission's numerous procedural and substantive errors in failing to recognize the ULP committed by the County. The superior court vacated the Commission's decision and concluded that, in fact, a ULP was committed by the County in this matter.[1] Following this decision, the County petitioned this Court for review.

The Guild implores this Court to set aside the Commission's decision, as was done by the Superior Court, and reinstate the Examiner's decision. The Commission erroneously interpreted the law and issued a decision not supported by the evidence. The Commission plainly did not apply the totality of the circumstances test for evaluating claims of bad faith bargaining. The overwhelming body of evidence, as meticulously detailed by the Examiner, showed strong support for finding a ULP under the applicable test. Legally, it was in error for the Commission to determine otherwise based on a misapplication of the relevant evidence.

Furthermore, the Commission's decision failed to follow prescribed procedures, is inconsistent with agency rules, and is arbitrary and capricious. Long-standing precedent by the Commission indicates that it acts as an appellate body and does not conduct a *de novo* review of the record except to determinate whether substantial evidence supports the Examiner's findings. In this case, the Commission engaged in such a review for unspecified reasons and failed to address or explain why the Examiner's detailed findings were not supported by substantial evidence.

[1] Verbatim Report, pg. 7, ln. 17-24; pg. 8, ln. 9-15

Additionally, the party appealing to the Commission carries the burden of proof to demonstrate why factual determinations are not supported by substantial evidence, which it cannot do when it fails to submit any briefing or argument laying out those positions. It is improper for the Commission to take on this burden for the advocates.

II. ASSIGNMENTS OF ERROR

A. Errors Assigned

The Respondent, Kitsap County Juvenile Detention Officers' Guild, asserts that PERC made the following errors:

1. Granting judgment in favor of Kitsap County through the issuance of a Decision dated June 2, 2015,[2] which vacated the decision of the Hearing Examiner that Kitsap County had breached its duty to bargain in good faith in violation of RCW 41.56.140(4) and (1) and committed an Unfair Labor Practice by refusing to engage in meaningful bargaining with the Guild concerning negotiations over an initial labor agreement; and
2. Vacating the decision of the Hearing Examiner, by failing to apply the correct standard of review, which requires that a party appealing an Examiner decision has the burden of demonstrating that the legal conclusions and order are not supported by substantial evidence, and that the Commission reviews the record to ensure only that there is substantial

[2] AR 1-23.

evidence in the record to support specific findings and conclusions.

B. Issues Presented

The Respondent, Kitsap County Juvenile Detention Officers' Guild, presents the following issues relating to these Assigned Errors:

1. The APA permits a court to grant relief from an agency order when the agency has erroneously interpreted or applied the law or the decision is not supported by substantial evidence. An employer can breach its duty to bargain in good faith in violation of RCW 41.56.140(4) and (1) when, based on the totality of circumstances, sufficient evidence exists to show the employer failed to send bargaining representatives with sufficient authority to engage in meaningful bargaining with a union. Did the Public Employment Relations Commission err when it reversed the decision of the Hearing Examiner when, on appeal, the Commission improperly applied this standard in concluding no ULP violation occurred regarding Kitsap County's ability to engage in meaningful bargaining with the Guild concerning negotiations over an initial labor agreement?
2. The APA permits a court to grant relief from an agency order when the decision fails to adhere to prescribed agency procedure, is inconsistent with agency rules, or is otherwise arbitrary and capricious. Under PERC procedures, a party

appealing an Examiner decision has the burden of demonstrating that the legal conclusions and order are not supported by substantial evidence, and the Commission reviews the record to ensure only that there is substantial evidence in the record to support specific findings and conclusions. Did the Public Employment Relations Commission err when it reversed the decision of the Hearing Examiner when, on appeal, the Commission conducted a full *de novo* review and failed to adhere to this review standard or explain why any of the Examiner's findings were not supported by substantial evidence?

III. STATEMENT OF CASE

A. Factual Background

The Guild was certified by PERC in July of 2012 as the new exclusive representative for detention officers and kitchen staff working at the Kitsap County Juvenile Detention Division. The first negotiation between the Guild and County to bargain over an initial labor agreement was September 11, 2012.[3] Fernando Conill, who was the County's Labor Relations Manager, attended this meeting on behalf of the County, and the Guild was represented by Christopher Casillas of Cline & Casillas and two members of the Guild, Pepe Pedesclaux and Jack Kissler.[4] At this meeting, Mr. Conill delivered a memorandum to the Guild's

[3] AR 426 (Ex. 1).
[4] AR 241 (Tr. 28: 1-3).

representatives that indicated he was the County's chief negotiator and would be representing the County's interest on "wage-related matters" during bargaining, and that Michael Merringer and Bill Truemper would also be attending future bargaining meetings representing the Superior Court's interests on "nonwage-related matters" as consistent with RCW 41.56.030(1).[5]

In October of 2012, both sides exchanged opening proposals on most of the issues.[6] The Guild's proposal was based on the prior CBA between the County and the Office and Professional Employees International Union, Local #11 ("OPEIU"). One important change the Guild sought from the old CBA with the prior bargaining agent was a change to the Article 10 grievance procedure. The Guild was deeply concerned with the old language because it contained a bifurcated procedure, distinguishing between "wage-related" and "non-wage related" grievances, and under this procedure the non-wage-related grievances terminated at Step 2 with the Superior Court judges (i.e. the employer), whose decision was "binding" on the parties.[7] The Guild considered this a "huge cornerstone of fairness"[8] that needed to be fixed.

The Guild was quite distressed upon reviewing the County's opening proposal, as it included terms like a 0% COLA for 2012 as well as the elimination of longevity for new hires. One of the more upsetting

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[5] AR 428 (Ex. 1).
[6] AR 436-587 (Exs. 4-6).
[7] AR 253 (Tr. 40: 3-5).
[8] AR 254 (Tr. 41:5).

features of the County's proposal was its effort to eliminate the daily overtime threshold and to eliminate using compensable hours to compute the weekly overtime threshold, which were long-standing benefits. According to Mr. Kissler, "that really—that upset me, because along with some of their other proposals, really, I guess, kind of devalued what we do."[9]

The parties continued to meet through the fall of 2012. At a regularly scheduled session on December 4, 2012, the Guild presented the County with a Resolution that was passed by the Board of County Commissioners ("BOCC") on November 26th.[10] The Resolution was an amendment to the Personnel Manual for the County, applicable to non-represented employees. In it, the meaning of compensable hours was changed, but the BOCC *elected to maintain the daily overtime threshold.* The Guild demanded an explanation from the County because, as stated by Mr. Kissler, "the resolution is 100 percent contrary to what...the county was trying to propose and negotiate at the table."[11] The County's reaction was to indicate that they "didn't know anything about the resolution...and said they would have to check into it and get back with us in regards to that."[12] Several bargaining meanings came and went, *while any further discussions on this important topic were delayed,* before

[9] AR 258-59 (Tr. 45:25-46:1-2).
[10] AR 588-589 (Ex. 7).
[11] AR 261 (Tr. 48: 6-8).
[12] AR 262 (Tr. 49: 1-3).

the County at last changed their proposal to make it "in line with this resolution."[13]

Similar to this *pattern of constant delay* and the *County needing to check with other people not at the table*, the parties also discussed the nondiscrimination language in each proposal, for which the Guild had proposed a slight modification, during this early December bargaining meeting. There was general agreement between the two sides on the issue, and the County did not indicate any opposition to the Guild's proposal modifying the language. Yet, when the Guild sough a tentative agreement ("TA") on the issue, the County indicated they could not do so at that time because, as testified to by Mr. Kissler, "they had to go talk to somebody about the language, I assume their legal department, but I don't know who."[14] Even though there was no known disagreement, the language was never formally subject to a TA because it was always a "we'll-get-back-to-you-kind-of-thing" from the County.[15]

At this same bargaining meeting in early December 2012, the Guild and County also discussed the grievance procedure. The Guild expressed some concerns over the nature of the procedure from the old OPEIU agreement and the fairness concerns related to certain grievances terminating with the judges. The County listened, and according to Mr. Kissler, "they understood our issues, but they really couldn't address them at the table. They – they had to take our proposal back to, I assume,

[13] AR 263 (Tr. 50: 6).
[14] AR 264 (Tr. 51: 23-24).
[15] AR 265 (Tr. 52:2).

the judges."[16] Mr. Merringer indicated he would talk to the judges about the Guild's concerns, but it wasn't for several more meetings that this was completed and the County was able to discuss the matter further, again resulting in delays that frustrated the bargaining process.

Finally, in late January 2013,[17] the parties were able to discuss the grievance procedure further after Mr. Merringer had an opportunity to speak to the judges. This discussion resulted only in increasing frustration for the Guild because the County was unable to explain its rationale, answer the Guild's relevant questions, or consider alternative solutions. After waiting for nearly two months, as recounted by Mr. Kissler, all Mr. Merringer had to say was that the judges "liked it the way it was and that they weren't going to – obviously they weren't going to agree to our offer."[18]

Growing ever more frustrated with the County's lack of responsiveness and engagement, the Guild posed several specific questions for the County. These questions centered on the County's position on the meaning of certain proposal sections and the County's rationale for not wanting binding arbitration to resolve contractual disputes. Again, the County "couldn't answer" the questions at that time, and its representatives requested the Guild write the questions down "so that they could talk to somebody who wasn't there"[19] and respond later.

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[16] AR 266 (Tr. 53: 17-19).
[17] AR 270 (Tr. 57: 20-25).
[18] AR 268 (Tr. 55: 14-15).
[19] AR 271 (Tr. 58: 7).

Not wanting to delay matters further, the Guild agreed to do so and the request was emailed to Mr. Conill and Mr. Merringer on February 7, 2013.[20]

Mr. Merringer did provide a prompt response to the February 7th email; however, the response only exacerbated the Guild's frustrations and added to further delays in bargaining. The "response" came in the form of a letter from the County's legal counsel, Jacquelyn Aufderheide, who never attended any of the bargaining sessions. Despite the clear nature of the Guild's questions, which inquired as to whether the County considered its proposal to waive any of the Guild's rights and to generally articulate the County's rationale for its proposal, *the response from Ms. Aufderheide did not remotely answer either question.*[21] On cross-examination, Mr. Merringer admitted that in comparing the Guild's questions with Ms. Aufderheide's response, the letter did "not specifically"[22] respond to the Guild's questions.

This unresponsiveness resulted in a series of email exchanges between the Guild and Mr. Merringer prior to the next regularly scheduled session on February 26th. Despite his subsequent admission at the hearing, Mr. Merringer originally asserted that Ms. Aufderheide's letter was responsive and necessary as the Guild had posed "legal questions"[23] that required consultation from her. However, the Guild

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[20] AR 590 (Ex. 8).
[21] AR 591-594 (Ex. 9).
[22] AR 395 (Tr. 182:20).
[23] AR 597-599 (Ex. 11).

pointed out that, for instance, one question concerned whether the County was seeking a waiver; yet Ms. Aufderheide's response makes no mention of this, and neglects to even use the word "waiver."[24] Additionally, Mr. Merringer eventually admitted on cross examination that the Guild's other question concerning the County's rationale was not "asking for a legal opinion"[25] and therefore did not require consultation with Ms. Aufderheide. The Guild also objected to the County not bringing persons to the table with authority to bargain, and requested the County do so for future meetings so the issues could be openly discussed at the table.[26]

With the email exchange producing little, if any, useful information for the Guild, the parties next met on February 26th for an agreed upon meeting that was to run from 9:00 a.m. until noon.[27] After a brief discussion of some other topics, the bargaining again turned to the topic of the grievance procedure. Mr. Merringer, attempting to respond to the Guild's questions in the earlier emails, started the discussion by indicating the County did not view the language as a waiver and the judges wanted to be the final step in the grievance procedure as they felt they were "in the best position to make the final decision."[28] Later, during cross-examination, Mr. Merringer admitted the presiding judge emailed him an outline of the various reasons behind their desire to remain with the current procedure, but he never read or shared this document with the

[24] AR 600-603 (Ex. 12).
[25] AR 399 (Tr. 186: 7).
[26] AR 595-596, 600-603 (Exs. 10, 12).
[27] AR 604-605 (Ex. 13).
[28] AR 611-612 (Ex. 15).

Guild.[29] Responding to a question as to why he did not share all that information, Mr. Merringer nonchalantly stated that he "wasn't aware" he was "obligated to,"[30] despite the fact that the Guild had repeatedly asked for a full explanation of the rationale.

The short response from Mr. Merringer prompted a number of follow up questions from the Guild seeking to better understand the County's rationale and exploring possible alternatives. Rather than engage the Guild in a full and frank matter in such discussions, Mr. Merringer chose to shut down, either saying nothing to additional questions posed by Mr. Casillas, or repeatedly indicating that he had already "answered"[31] the question even when new questions were posed. In addition to its numerous follow-up questions, the Guild was also hoping to engage the County in other topics related to the grievance procedure, such as how the County understood the distinction between "wage-related" and "non-wage-related" grievances.

As noted by Mr. Kissler, Mr. Merringer was becoming "clearly angry" during this time, and as a result Mr. Conill suggested that the parties take a break for a bit and caucus.[32] As later recounted by Mr. Merringer, during the break, rather than discussing or consulting with Mr. Conill, who was present at the table and the County's Labor Relations Manager, he chose to call his legal advisor, Ms. Aufderheide, for direction

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[29] AR 399 (Tr. 186: 8-19).
[30] AR 400 (Tr. 187: 9).
[31] AR 611-612, 613-614 (Exs. 15, 16).
[32] AR 611-612, 613-614 (Exs. 15, 16); AR 286 (Tr. 73:4-7).

on how to proceed.[33] Ms. Aufderheide directed him to instruct the Guild to move to another agenda item, and, astonishingly, "if the guild refused to move off of grievance and refused to move on to any other agenda items, to terminate or to end the session."[34] Mr. Merringer took this advice, and upon returning, issued an ultimatum to the Guild that if it did not move to another issue, he was leaving.[35] When the Guild indicated it still had additional questions and a desire to talk about matters further, Mr. Merringer walked out and shut down discussions for the day.[36]

B. Procedural History

Following a multi-day hearing where both parties presented numerous exhibits and the hearing examiner considered the testimony of various witnesses, on October 6, 2014 Examiner Diane Ramerman issued a decision, including 26 different detailed findings of fact, concluding that Kitsap County breached its good faith bargaining obligations by not sending bargaining representatives to the table with sufficient authority to engage in meaningful bargaining, which was a violation of RCW 41.56.140(4) and (1). Specifically, after reviewing the evidence and making credibility determinations, the Examiner found:

> Employer representatives at the table did not have sufficient authority to engage in meaningful bargaining. They were not adequately informed, could not enter TAs without consulting with those not at the bargaining table, could not adequately explain the employer's proposals or

[33] AR 402, 403 (Tr.189: 2-25; 190: 1-2).
[34] AR 404 (Tr. 191: 1-3).
[35] AR 611-612, 613-614, 754-755 (Exs. 15, 16, 24).
[36] AR 611-612, 754-755 (Exs. 15, 24).

> positions, and unilaterally terminated a bargaining session...
>
> ...through its action of relying on the opinion and recommendation of the employer's legal counsel, the employer limited the authority of its negotiators at the bargaining table with regard to the issues of grievance procedures and the duty to meet at reasonable times.... By not giving the employer representatives at the table sufficient authority to meaningfully bargain prior to reaching a TA on outstanding issues, the employer effectively hamstrung it (sic) representatives at the table.[37]

Kitsap County timely filed a notice of appeal on October 27, 2014. Per WAC 391-45-350(6), the County's brief in support of its appeal was due by November 10, 2014; however, the County did not file its brief until November 13, 2014. The County subsequently filed a motion to file an untimely brief, which was opposed by the Guild because it is not permitted by the regulations. Appropriately, the Executive Director of PERC, acting on behalf of the Commission, denied the County's motion and indicated it would not consider the employer's untimely appeal brief.

On appeal, the Commission vacated and substituted its own findings of fact for findings 10 through 15 and 22 through 26, resulting in new conclusions of law and an order vacating the Examiner's decision finding a ULP had been committed.[38] In conducting its review, on no single occasions did the Commission cite to any of the specific findings and credibility determinations made by Examiner Ramerman or explain why any of those findings were not supported by

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[37] *Kitsap County*, Decision 12163 (PECB, 2014).
[38] CP 8-30.

substantial evidence. Instead, every single citation to evidence in the body of the Commission's decision was to the original record in the form of testimony or exhibits, effectively resulting in an independent review of the evidence presented in the case.

The Guild petitioned Thurston County Superior Court for review, asserting that the Commission's order is not supported by substantial evidence, is arbitrary and capricious, and is inconsistent with long-standing agency rules.[39] The Superior Court determined that there was not a lack of substantial evidence to support the hearing examiner's facts.[40] The Court then turned to the issues of law,[41] and held that it "in this particular case...there was a violation of good-faith bargaining, and thus an unfair labor practice in looking at the totality of the circumstances."[42]

The County then appealed to this court.

IV. ARGUMENT

The instant case presents numerous grounds on which this Court should overturn the Commission's erroneous decision and uphold that of the Hearing Examiner. First, the Commission made an error of law when it erroneously held that Kitsap County did not commit an Unfair Labor Practice. Second, the Commission made an error of law by failing to follow its own procedural requirements – plainly applying an incorrect

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[39] CP 4-5.
[40] Verbatim Report, pg. 5, ln. 10-18.
[41] Verbatim Report, pg. 5, ln. 18-20.
[42] Verbatim Report, pg. 6, ln. 16-18.

standard of review for the findings of fact and failing to hold the County to its burden of proof.

A. Standard of Review

This case is an appeal of a superior court decision that itself stemmed from a Petition for Review of an administrative decision in an adjudicative proceeding. This Court sits in the same position as the superior court. Therefore, the parties' relative burdens before this court are the same as they were before the superior court. As such, this appeal is governed by the review procedures of the APA defined in RCW 34.05.570(3):

> Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> > (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
> >
> > (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> >
> > (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> >
> > (d) The agency has erroneously interpreted or applied the law;
> >
> > (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
> >
> > (f) The agency has not decided all issues requiring resolution by the agency;

> (g) A motion for disqualification under *RCW 34.05.425* or *34.12.050* was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
>
> (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
>
> (i) The order is arbitrary or capricious.

In *Pasco Police Officers' Association v. City of Pasco*, the Washington State Supreme Court described the appropriate standard of review of PERC rulings, emphasizing that the courts give relief where PERC makes an error of law:

> Decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Administrative Procedures Act. RCW 34.05.570(3) permits relief from an agency order if the agency erroneously interpreted or applied the law. Under the error of law standard, the court may substitute its interpretation of the law for that of PERC.[43]

The Washington State Supreme Court has also already considered, and rejected, the argument that PERC is the final arbiter of questions of public sector labor law: "Every administrative agency must interpret the law in order to enforce or to follow it. It is a quantum leap in logic, however, to jump from the fact that PERC is empowered to prevent unfair labor practices to the conclusion that PERC is the exclusive decider of public labor law questions."[44] Although the Commission is owed "great weight

[43] 132 Wn.2d 450, 458 (1997) (internal citations omitted).
[44] *State ex. Rel. Graham v. Northshore Sch. Dist.*, 99 Wn.2d 232, 240, 662 P.2d 38 (1983).

and substantial deference,"[45] it is well settled that "[t]he declaration of legal rights and interpretation of legal questions is the province of the courts and not of administrative agencies."[46] Therefore, when the Commission makes an error of law, as here, its decision is not entitled to deference by this Court.

B. The Commission Erroneously Interpreted the Law and Issued an Order not Supported by the Record When it Determined that Kitsap County Did Not Commit a Refusal to Bargain and Interference Unfair Labor Practice

The Commission committed an error of law when it erroneously interpreted the law and held that Kitsap County did not commit a refusal to bargain and interference unfair labor practice. This Court should reinstate the Hearing Examiner's order because the Examiner, unlike the Commission, correctly applied the totality of the circumstances standard. The County refused to bargain, and in so doing, committed an unfair labor practice.

1. PERC Utilizes the Totality of the Circumstances Standard to Assess Good Faith Bargaining Behavior

Collective bargaining is statutorily defined to include the "mutual obligation of the employer and the exclusive bargaining representative to meet at reasonable times and negotiate in good faith over grievance procedures and personnel matters, including wages, hours, and working

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[45] *City of Vancouver v. Pub. Emp't Relations Comm'n*, 180 Wn. App. 333, 347, 325 P.3d 213 (2014).
[46] *State ex. Rel. Graham*, 99 Wn.2d at 240.

conditions."[47] "A public employer has a duty to bargain with the exclusive bargaining representative of its employees."[48] An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice.[49] "A finding that a party has refused to bargain is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining."[50]

"In determining whether an unfair labor practice has occurred, the totality of the circumstances must be analyzed."[51] In *Shelton School District*, the Commission elaborated on the meaning of the totality of circumstances approach when analyzing conduct during negotiations.[52] The Commission found that the employer committed an unfair labor practice, specifically noting:

> [t]he [employer] created a context of bad faith to such a degree that its position on specific items cannot be evaluated in isolation. A position taken by a party in a context of good faith bargaining may be perfectly lawful, while the same position if adopted as part of an overall plan to frustrate agreement, and to penalize employees for trying to exercise their statutory right to bargain collectively, cannot be given agency imprimatur.[53]

"Thus, a party may violate its duty to bargain in good faith either by one per se violation, such as refusal to make counter proposals, or through

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[47] RCW 41.56.030(4).
[48] *City of Seattle*, Decision 12060 (PECB, 2014) (citing RCW 41.56.030(4)).
[49] *Id.* (citing RCW 41.56.140(4) and (1)).
[50] *Snohomish County*, Decision 9834-B (PECB, 2008); *See also Spokane School District*, Decision 310-B (EDUC, 1978).
[51] *City of Seattle*, Decision 12060 (PECB, 2014) (citing *Walla Walla County*, Decision 2932-A (PECB, 1988); *City of Mercer Island*, Decision 1457 (PECB, 1982)) *aff'd*, Decision 12060-A (PECB, 2014).
[52] Decision 579-B (PECB, 1984).
[53] *Id.*

a series of questionable acts which when examined as a whole demonstrate a lack of good faith bargaining, but by themselves would not be a per se violation."[54] "Because this standard permits an examiner the flexibility to subjectively examine a party's otherwise lawful conduct in relation to its other conduct to find an unfair labor practice, an examiner must explain his or her reasoning as to why the totality of the employer's conduct constitutes an unfair labor practice."[55]

"When the Commission finds a refusal to bargain violation under the statutes it administers, it automatically finds that the employer derivatively interferes with employee rights."[56] "When an employer commits a refusal to bargain violation by making a unilateral change, the Commission finds that the action has 'an intimidating and coercive effect' on employees."[57] "Thus, if an employer unlawfully implements a unilateral change to a mandatory subject of bargaining, the employer's violation of RCW 41.56.140(4) also results in a derivative violation of RCW 41.56.140(1)."[58]

The definition of "good faith" bargaining, and the obligations of the parties, are well-established. "The obligation to bargain in good faith encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a

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[54] *Snohomish County*, Decision 9834-B (PECB, 2008).
[55] *Id.*
[56] *Mason County*, Decision 10798-A (PECB, 2011); *Battle Ground School District*, Decision 2449-A (PECB, 1986).
[57] *Battle Ground School District*, Decision 2449-A (PECB, 1986).
[58] *Walla Walla County*, Decision 11877 (PECB, 2013).

mutually satisfactory accommodation of the interests of both the employer and employees."[59] "While the parties' collective bargaining obligation under RCW 41.56.030(4) does not compel them to agree to proposals or make concessions, a party is not entitled to reduce collective bargaining to an exercise in futility."[60] Bargaining tactics that evidence a desire to maintain a predetermined outcome or employer proposals that are knowingly unpalatable to the union have been found to evidence bad faith under the totality of circumstances standard.[61]

Parties must explain their reasoning during this process. "The bargaining obligation also imposes a duty on the parties to explain their proposals and provide their reasoning in a manner designed to permit the other party to counter propose language that may be accepted."[62] Furthermore, "[i]ntegral to the good faith collective bargaining process, the parties are expected to explain both their own proposals and their reasons for rejecting the proposals of the opposite party, so that their rationale may be properly understood and new proposals may be formulated."[63] This requires sending bargaining representatives who are able to understand and explain the rationale.

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[59] *Snohomish County*, Decision 9834-B (PECB, 2008).
[60] *Id.*
[61] *See Mason County*, Decision 3706-A (PECB, 1991); *Snohomish County*, Decision 9834 (PECB, 2007) (citing *Flight Attendants v. Horizon Air Industries, Inc.*, 976 F.2d 541 (9th Cir. 1992)).
[62] *Snohomish County*, Decision 9834 (PECB, 2007) (citing *Fort Vancouver Regional Library*, Decision 2350-C (PECB, 1988)).
[63] *Id.*

These representatives must also come to the table with actual authority to enter into agreements. "Public sector collective bargaining is different from its private sector counterpart because public sector unions cannot expect management representatives to possess final authority to conclude agreements at the bargaining table."[64] "Keeping that distinction in mind, Commission precedent requires a bargaining team to be able to effectively represent the employer in labor relations, by virtue of its position at the bargaining table."[65] "The team must have *actual authority* to reach tentative agreements, not tentative authority to reach actual agreements."[66] "Therefore, the employer must provide its bargaining team with the authority to consider different proposals and to make commitments on mandatory subjects of bargaining on behalf of the employer, subject to approval by the county commissioners."[67]

What sort of authority is necessary? "Although the Commission has not defined the phrase 'authority to bargain,'" prior Commission holdings are "in line with the NLRB's decisions distinguishing actual from titular authority to represent a party in collective bargaining."[68] "The NLRB defined the former as 'sufficient authority to engage in meaningful negotiations.'"[69] "The Federal Labor Relations Authority (FLRA), in turn, has found that the parties in the federal public sector must 'provide

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[64] *Sultan School District,* Decision 1930 (PECB, 1984), *aff'd,* Decision 1930-A (PECB, 1984).
[65] *Snohomish County*, Decision 9834 (PECB, 2007).
[66] *Id.* (emphasis added).
[67] *Id.*
[68] *Western Washington University*, Decision 9309 (PSRA, 2006).
[69] *Id.* (citing *Southwestern Portland Cement Company*, 289 NLRB 1264 (2002)).

representatives who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit.'"[70]

Included in the definition of "collective bargaining" is the obligation that the parties "meet at reasonable times." If an employer has "either failed or refused to meet with the complainant, or imposed unreasonable conditions or limitations which frustrated the collective bargaining process"[71] that can constitute an unfair labor practice. Thus, the unilateral cancellation of bargaining meetings by an employer is an "example of its intention to delay and frustrate bargaining."[72] An employer canceling a negotiating session is "another example of a pattern on the part of the employer designed to frustrate and delay bargaining with the union in violation of its good faith bargaining obligation."[73]

Given these well-established standards, there is no doubt that the County failed in its bargaining obligations and therefore committed an Unfair Labor Practice.

2. The Totality of Kitsap County's Behavior Evidences a Clear Intent to Frustrate and Delay Bargaining Contrary to the County's Good Faith Bargaining Obligations

Under the totality of circumstances standard, the Examiner determined that the County committed a ULP through its refusal to send

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[70] *Id.* (citing *National Treasury Employees Union and Department of the Treasury, Internal Revenue Service*, 13 FLRA 554 (1983)).
[71] *City of Mountlake Terrace*, Decision 11831-A (PECB, 2014).
[72] *Snohomish County*, Decision 9834 (PECB, 2007).
[73] *Snohomish County*, Decision 9834-B (PECB, 2008).

representatives to the table with sufficient authority to engage in meaningful bargaining. Specifically, she found:

> taken together the employer's representatives' (1) failure to explain the employer's intent, (2) lack of adequate knowledge, (3) inability to enter TAs without consulting with those not at the table, and (4) unilateral termination of the parties' final session...shows the employer failed to bargain in good faith.[74]

The County's failure to bargain occurred across four different mandatory subjects of bargaining – the grievance procedure; language on overtime rules; a provision on nondiscrimination; and the County's refusal to meet at reasonable times, as summarized below.

Overtime: In its opening proposal, the County had proposed to eliminate a long-standing practice of paying "contractual overtime" to employees; meaning any time worked over a regularly scheduled shift would be paid at the overtime rate of pay. The Guild strongly objected to such a proposal during bargaining because of the lost compensation that would result. [75] At a bargaining session in December 2012, the Guild presented the County's bargaining team with a Resolution passed by the Board of County Commissioners on November 26th amending the personnel manual for non-represented employees that included language maintaining the "contractual overtime" provision.[76] When asked why the County would maintain such a provision for non-represented employees but insist on the exact opposite for Guild members, the County's

[74] *Kitsap County*, Decision 12163 (PECB, 2014) at 14.
[75] AR 258-59 (Tr 45: 25 - 46: 1-2).
[76] AR 588-89 (Ex. 7).

representatives indicated they did not even know about the resolution and would have to check with other County officials about the status of its proposal.[77] It was not until several bargaining sessions later, all the while the County continued to maintain its proposal eliminating contractual overtime, which hampered the bargaining process, did the County finally withdraw the proposal.[78]

That the County's representatives were unaware that their proposal was in direct opposition to the Commissioner's resolution, and that it took several bargaining sessions for them to confer with someone with authority and abandon the proposal, demonstrates that the team did not have actual authority.[79]

Nondiscrimination: The Guild had presented a proposal prohibiting any kind of discrimination against its membership within designated protected classifications. During bargaining, the County's team indicated that there were no concerns with the Guild's language and did not indicate any opposition. The Guild, believing it could resolve that particular issue given such a response, sought a tentative agreement on the proposal from the County; however, the County indicated it was not able to do that at the time and had to consult with other officials not at the table. Recall that

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[77] AR 261-62 (Tr. 48: 6-8 – 49: 1-3).
[78] AR 263 (Tr. 50: 6).
[79] "The team must have *actual authority* to reach tentative agreements, not tentative authority to reach actual agreements....the employer must provide its bargaining team with the authority to consider different proposals and to make commitments on mandatory subjects of bargaining on behalf of the employer, subject to approval by the county commissioners." *Snohomish County*, Decision 9834 (PECB, 2007) (emphasis added).

good faith bargaining requires "[t]he team must have actual authority to reach tentative agreements...."[80]

As noted by the Examiner, the County argued in the hearing that it needed to compare the Guild's proposal with apparent revisions being made to the County-wide policy. However, after reviewing the evidence, the Examiner found "no evidence...that the employer communicated any information regarding the comparison back to the union" and it was "not clear...why any possible change to the policy was not already reflected in the employer's proposal."[81] This showed, for the examiner, the "employer representative's lack of authority to agree to anything...and effectively hamstrung its bargaining team..."[82]

Grievance Procedure: The parties first discussed the grievance procedure in detail at a December 4, 2012 bargaining session where the Guild expressed grave concerns over the County's proposal, which created different classes of grievances and prohibited certain grievances from moving beyond review of the Superior Court judges, acting as the employer, thus preventing a final resolution on a dispute in front of a neutral arbitrator. The County's representatives listened to the concerns but indicated they could not respond until Mr. Merringer had an opportunity to meet with the judges later in the month; delaying any further discussion on the topic until a meeting on January 25, 2013.

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[80] *Id.*
[81] *Kitsap County*, Decision 12163 (PECB, 2014) at 18.
[82] *Id.*

At this January session, Mr. Merringer read from a prepared script that in the words of the Examiner "was not so much an explanation of the employer's proposals...as it was a position statement." The Guild continued to press for an explanation of the employer's proposal and rationale for excluding grievances from binding arbitration, which eventually resulted in the Guild having to submit its questions in writing so the County's team could have them reviewed by someone else, as they were unable to respond. The response came from the County's legal counsel; however, Mr. Merringer, under cross-examination, admitted that the County's written response did not answer any of the Guild's specific questions and that the Guild was never requesting a legal analysis of the proposal and instead only wanted to better understand the County's intent. When pressed at another negotiation session on February 26, 2013 to respond to the Guild's outstanding questions, "Merringer simply re-read the script he used at the parties' meeting on January 25, 2013."[83]

The County's actions herein show a complete disregard for its duty to "explain [its] proposals and provide [its] reasoning in a manner designed to permit the other party to counter propose language that may be accepted."[84] Explaining the underlying reasoning is "[i]ntegral to the good faith collective bargaining process" because explaining the proposals and the underlying reasoning ensures "their rationale may be

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[83] *Id.* at 16.
[84] *Snohomish County*, Decision 9834 (PECB, 2007) (citing *Fort Vancouver* Regional *Library,* Decision 2350-C (PECB, 1988)).

properly understood and new proposals may be formulated."[85] Recall that Mr. Merringer had received such an explanation from one of the judges, but he never read or shared this document with the Guild.[86] Responding to a question as to why he did not share all that information, Mr. Merringer nonchalantly stated that he "wasn't aware" he was "obligated to,"[87] despite the fact that the Guild had repeatedly asked for a full explanation of the rationale. How can the parties move toward "full and frank discussions on disputed issues, and to explore possible alternatives" if one party refuses to explain its reasoning or answer questions?[88]

Meeting at Reasonable Times: The parties had agreed to a three-hour bargaining session on February 26th that was to include a continued discussion on the grievance procedure. About an hour into the meeting the parties turned to a discussion of the grievance procedure, and upon further questioning over the employer's rationale for its proposal, Mr. Merringer became angry and the employer suggested taking a break. During the break, Merringer called the employer's legal counsel, despite having the County's Labor Relations Manager at his side, who instructed Merringer to tell the Guild to move onto a different topic or to leave. Upon returning to the meeting, which was only half-way through the agreed upon time at that juncture, Merringer issued his ultimatum to the Guild to talk about something else or he would leave. When the Guild

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[85] *Id.*
[86] AR 399 (Tr. 186: 8-19).
[87] AR 400 (Tr. 187: 9).
[88] *Snohomish County*, Decision 9834-B (PECB, 2008).

indicated it still had other issues concerning the grievance procedure to discuss, Merringer walked out and ended the meeting. By unilaterally ending the meeting, the Examiner found the employer "effectively hamstrung its bargaining team at the table."[89]

Under the totality of circumstances standard, there was more than ample evidence presented showing the County did not send representatives to the table with sufficient authority to engage in meaningful bargaining. The County proposed eliminating "contractual overtime" for Guild members, while at the same time, the County Commissioners amended the personnel manuals so that non-represented employees would have exactly that overtime – the County's bargaining representatives did not even know about the Commissioners' action until the Guild notified them, and it took several *more* bargaining sessions before the County finally withdrew the proposal.

When the Guild proposed certain nondiscrimination language and asked for a tentative agreement, the County's bargaining team stated it could not tentatively agree without checking with individuals not present – even though, as the Examiner pointed out, any possible change to the policy should have already been reflected in the County's proposal. Even more egregiously, the County refused to answer the Guild's questions about its proposed grievance procedure, and after inexcusable delays, merely read the Guild a script that the County admitted did not answer the

[89] *Kitsap County*, Decision 12163 (PECB, 2014) at 21.

Guild's questions – even though the County had the answers to the questions, and just felt it was not obligated to share them. The County's bargaining team also unilaterally ended a bargaining session after calling its legal counsel on the phone, rather than engaging in full and frank discussions about the proposed grievance procedures.

The County's actions "created a context of bad faith to such a degree that its position on specific items cannot be evaluated in isolation."[90] The County's representatives' inability to enter into tentative agreements, explain proposals, and decisions to unilaterally terminate meetings hamstrung the negotiations to a point of bad faith and in violation of RCW 41.56.140(4) and (1). One of the central components of PECBA is a requirement to bargain in "good faith," and the totality of the circumstances standard is the mechanism utilized to evaluate this otherwise nebulous standard. At its core, the good faith requirement is one in which collective bargaining occurs in an environment where both parties commit themselves to the goal of reaching a mutually satisfactory CBA and that those negotiations do not devolve into an exercise of futility. The County's actions herein violated such a requirement by frustrating, delaying, and generally inhibiting the Guild from reaching a new CBA. For those basic reasons, the Examiner's original determination that the totality of this behavior breached the County's duty in this situation should be recognized and upheld.

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[90] *Shelton School District*, Decision 579-B (PECB, 1984).

C. The Commission's Decision Overturning the Hearing Examiner's Determination that Kitsap County Committed a ULP Fails to Adhere to Agency Procedures and Rules and is in turn Arbitrary and Capricious.

In addition to the substantive merits of the case, the Commission committed arbitrary and capricious errors of law when it failed to adhere to agency procedures and rules. First, the Commission disregarded the standard of review mandated by the agency's own precedent and by our State Supreme Court by conducting a *de novo* review of the facts, without examining whether the Examiner's findings of fact were supported by the agency record. Second, the Commission arbitrarily and capriciously ignored state law and its own rules when it determined that the County, who failed to file any compliant briefs, had met its burden of proof in challenging the Examiner's fact findings. Either of these gross procedural errors provides sufficient grounds for this court to set aside the Commission's decision.

1. The Commission Failed to Follow its Established Procedures in According Substantial Weight to the Findings and Credibility Determinations Made by its Examiner and only Overturning those Determinations upon Finding Substantial Evidence to the Contrary

In reviewing decisions filed under WAC Chapter 391-45, the Commission does not conduct a *de novo* review of the Examiner's fact findings.[91] The Commission must review findings of fact to determine

[91] *Community College District 13*, Decision 8117-B (PSRA, 2005) ("This Commission does not conduct a *de novo* review of examiner decisions in unfair labor practice proceedings under Chapter 391-45 WAC"); *see also Dieringer School District*, Decision

whether substantial evidence supports them, and if so, whether those findings in turn support the conclusions of law.[92] More precisely: "when reviewing findings of fact, the scope of the Commission's review is to determine whether there is substantial evidence in the record to support those findings, and to determine whether those findings support the conclusions of law."[93] Substantial evidence requires that "the record contains sufficient evidence of the quantity to persuade a fair-minded, rational person of the truth of the declared premise."[94] This focus on substantial evidence is hardly new – the Commission has borrowed this standard from the State Supreme Court, which has phrased these inquiries the same way for fifty years.[95]

In 1966, that court explained that when the trial court (or in this case, the Hearing Examiner) "weighed the evidence adduced, and determined that the credible evidence established facts" then the appellate review "is limited to ascertaining whether the essential facts found by the

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8956-A (PECB, 2007) (identical phrasing); *City of Edmonds*, Decision 8798-A (PECB, 2005) (identical phrasing).

[92] *Central Washington University*, Decision 10967-A (PECB, 2012) (citing *C-Tran*, Decision 7087-B and 7088-B (PECB, 2002)); S*ee also Brinnon School District,* Decision 7210-A and 7211-A (PECB, 2001); *Cowlitz County*, Decision 7007-A (PECB, 2000); *World Wide Video Inc. v. Tukwila*, 117 Wn.2d 382 (1991), *cert. denied,* 118 L. Ed. 2d 391 (1992).

[93] *Central Washington University*, Decision 10967-A (PECB, 2012), (citing *C-Tran*, Decision 7087-B and 7088-B (PECB, 2002)).

[94] *Central Washington University*, Decision 10967-A (PECB, 2012), (citing *Renton Technical College*, Decision 7441-A (CCOL, 2002); *PERC v. City of Vancouver*, 107 Wn. App. 694 (1991)); *see also C-Tran*, Decision 7087-B and 7088-B (PECB, 2002) (using identical phrasing).

[95] *See Brinnon School District*, Decision 7210-A and 7211-A (PECB, 2001) (citing *Curtis v. Security Bank*, 69 Wn. App. 12 (1993). *See also Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 (1978); *Morgan v. Prudential Ins. Co. of America,* 86 Wn.2d 432 (1976); *Enterprise Timber, Inc. v. Washington Title Ins. Co.*, 76 Wn.2d 479, 457 P.2d 600 (1969); *N. Fiorito Co. v. State*, 69 Wn.2d 616, 419 P.2d 586 (1966).

trial court are supported by substantial evidence, and, if so, whether such facts support the judgment of dismissal."[96]

In answering whether fact findings are backed by substantial evidence and whether such findings in turn support the conclusions of law, "[t]he Commission attaches considerable weight to the factual findings and inferences, including credibility determinations, made by its examiners."[97] Furthermore, such "deference...is highly appropriate in fact-oriented appeals."[98] This is because

> They have had the opportunity to personally observe the demeanor of the witnesses. The inflection of the voice, the coloring of the face, and perhaps the sweating of the palms, are circumstances that we, as Commission members are prevented from perceiving through the opaque screen of a cold record. This deference, while not slavishly observed on every appeal, is even more appropriate of a "fact oriented" appeal....[99]

Consider how the State Supreme Court has explained this crucial standard in other areas: "We accept challenged findings of fact as long as they are supported by substantial evidence.... We will not overturn findings based

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[96] *N. Fiorito Co. v. State*, 69 Wn.2d 616, 620, 419 P.2d 586, 589 (1966).
[97] *Central Washington University*, Decision 10967-A (PECB, 2012) (citing *Cowlitz County*, Decision 7210-A (PECB, 2001)); *see also Kiona Benton School District*, Decision 11563-A (EDUC, 2013); *City of Edmonds*, Decision 8798-A (PECB, 2005) ("The Commission attaches considerable weight to the factual findings and inferences made by its examiners.").
[98] *C-Tran*, Decision 7087-B and 7088-B (PECB, 2002), (citing *Brinnon School District,* Decision 7210-A and 7211-A (PECB, 2001) (citing *Cowlitz County*, Decision 7007-A (PECB, 2000)).
[99] *King County*, Decision 7104-A (PECB, 2001); (citing *Port of Pasco*, Decision 3307-A (PECB, 1990); *Educational Service District 114*, Decision 4361-A (PECB, 1994)).

simply on an alternative explanation or versions of the facts previously rejected by the hearing officer and Board."[100]

In its decision, the Commission dramatically deviated from its established rules and procedures by conducting a full *de novo* review of the factual record and affording no deference to the hearing examiner's factual findings, inferences, and credibility determinations. Contrary to the Commission's often-repeated standard that it only reviews the record to ensure that there is substantial evidence to support the examiner's factual findings, such that those findings ultimately support the legal conclusions, the Commission wholly disregarded this review standard by not even discussing the Examiner's findings, let alone explaining why any such findings were not supported by substantial evidence, and substituting in its place an independent review of the record. Beyond failing to adhere to its established procedures as an appellate body with limited review jurisdiction, the Commission's decision to conduct an independent review of the record resulted in numerous factual errors resulting in an arbitrary and capricious decision.

The nature of the Commission's unprecedented full *de novo* review of the factual record begins from the fact that the Examiner's rulings and determinations are *only mentioned twice throughout the entire opinion* – once in the introduction reciting the procedural history and a second time in footnote 11 when the Commission observes that the Examiner did not

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[100] *In re Disciplinary Proceeding Against Abele*, 184 Wn.2d 1, 12, 358 P.3d 371, 377 (2015) (citations omitted).

enter a credibility determination on a particular point. Beyond those two passing mentions, nowhere throughout the entire body of the opinion is there one iota of discussion concerning any determinations or findings made by the Examiner, let alone whether such detailed findings were supported by substantial evidence, and if not, why. The Examiner's decision was 29 pages in length with 26 specific and detailed factual findings; yet, at no place throughout its entire opinion does the Commission indicate or discuss that it reviewed those determinations or explain why such determinations were not supported by substantial evidence in the record.

This lack of deference and failure to adhere to the Commission's standard of review is further evidenced by the fact that all the citations to authority in the Commission's analysis came from the original record. The "Analysis" portion of the Commission's decision starts on page 6 and carries through to the end of the decision on page 19, where the Commission details the new Order. In that "analysis," the Commission has included 46 different footnotes, all of which are citations to the original record, whether in the form of the transcript or specific exhibits, and again not a single mention of any findings or determinations made by the Examiner, with the exception of footnote 11 where the Commission asserts the examiner did not enter a specific credibility determination on a particular piece of testimony. It is evident from this fact that the Commission took it upon itself to review the entire record, anew, and

make its own factual determinations as to what had occurred without any deference to findings made by the Examiner or why such determinations were, in fact, not supported by the record.

One of the reasons why the Commission has long-adhered to a review standard that accords substantial weight to the factual findings and determinations of the hearing examiner is that, as an appellate body, the Commission does not have the opportunity to participate in the hearing when the various pieces of evidence are received and judgments can better be made about the credibility of various pieces of evidence, such as the testimony of witnesses. The hearing examiners, having such an opportunity, are in a better position to understand the intricacies of the case, particularly one that is fact intensive, and make determinations as to "what most likely happened." Reviewing the record cold without reference and consideration to the Examiner's findings, as the Commission has done in this situation, can result in various errors since none of the commissioners had the opportunity to participate in the hearing. In fact, that is precisely what has happened in this case, and those errors in understanding the factual record have resulted in a decision that is arbitrary and capricious.

As an example, the Commission held "absent evidence that the employer's negotiators need to consult with individuals outside of the bargaining team, we are unable to find that the inability to reach agreement on ground rules...was in bad faith or because the employer's

negotiating team lacked authority to engage in meaningful bargaining."[101] The Commission is simply overlooking evidence in the record on this point, some of which it just referenced. In the previous paragraph, the Commission acknowledged that Union Vice President Kissler testified that the parties failed to reach an agreement because the employer did not send a decision-maker to the table.[102] Specifically, Kissler testified: "...we couldn't discuss it, really, at the table, because the – whoever made the decision on the ground rules, they always said Fernando had to talk to somebody about it, and they weren't there."[103] This testimony is evidence. The Commission acknowledged that this testimony is in the record. Yet the Commission stated there was no evidence that "the employer's negotiators needed to consult with individuals outside of the bargaining team...."[104]

The Commission made the same error in its *de novo* fact-finding when it turned its attention to the overtime issue. The Commission found "[t]here is no evidence that Conill's lack of knowledge was because the employer sent its negotiator to the table without authority to bargain."[105] And here again, the Commission ignored that there *was* such evidence: the Hearing Examiner entered a finding of fact that "Kissler testified that the employer team 'didn't know anything about his resolution and didn't have a response or an answer, and said they

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[101] AR 9.
[102] *Id.*
[103] AR 247.
[104] AR 9.
[105] AR 11-12.

would have to check into it and get back to us in regards to that,'" which finding was supported by unrefuted testimony in the hearing.[106]

Turning to the grievance procedure, the Commission found "the record does not demonstrate a lack of authority to bargain the grievance procedure." Similarly, the Commission stated "[t]here is no evidence that the employer's proposal or rationale was presented in bad faith or that the employer's reasons were designed to frustrate bargaining."[107] Yet, the Examiner's fact findings detail how Merringer prepared a "script" based on information he was told to relay, and indicated to Casillas that other answers on the employer's proposal would need to be presented, in writing, so he could consult with legal counsel not present at the meetings.[108] Examiner Ramerman found "on cross-examination, Merringer admitted that in comparing the union's questions...with the employer's legal counsel's response, the employer did '[n]ot specifically' respond to the union's questions."[109] Lastly, in commenting on why it believed the employer's actions around the grievance procedure were not in bad faith, the Commission noted the employer was "simply proposing language from the existing collective bargaining agreement."[110] But, the Guild and County had never been party to a CBA before, so there was no "existing" agreement.[111]

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[106] AR 244 (testimony); 122-123 (Examiner).
[107] AR 14.
[108] AR 123.
[109] AR 182 (testimony); AR 124 (Examiner); *See also* 600-603.
[110] *Kitsap County*, Decision 12163-A (PECB, 2015) at 14.
[111] *Kitsap County*, Decision 12163 (PECB, 2014) at 2.

2. The Commission Acted in an Arbitrary Fashion Inconsistent with its Established Procedures in Not Requiring the Appellant to Carry its Burden of Proof to Show How the Examiner's Findings were Not Supported by Substantial Evidence

A crucial piece of the Commission's standard of review is that the "party assigning error has the burden of showing a challenged finding is in error and not supported by substantial evidence; *otherwise findings are presumed correct.*"[112] This follows naturally from the Commission's standard of review. Put differently, "if the appealing party fails to assign error to a specific finding of fact, that unchallenged finding is considered to be true on appeal."[113] For example, in *Brinnon School District*[114] the Commission noted that although the appealing party listed numerous findings of fact in its notice of appeal, it failed to address those facts in its briefing. The Commission reasoned this omission indicated that the appellant "appears to agree with those findings or does not argue what part(s) of those findings are in error....Because the [appellant's] arguments do not show how [those fact findings] are in error, [the appellant] has not met its burden, and we will treat these findings as verities on appeal."[115] The Commission has

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[112] *Community College District 13*, Decision 8117-B (PSRA, 2005) ("Unchallenged findings of fact are considered as a verity by the Commission on appeal") (citing *Brinnon School District*, Decision 7210-A and 7211-A (PECB, 2001) (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990) (emphasis added))); *see also Cowlitz County*, Decision 7210-A (PECB, 2001); *Green v. McAllister*, 103 Wn. App. 452 (2000).
[113] *Central Washington University*, Decision 10967-A (PECB, 2012) (citing *C-Tran*, Decision 7087-B and 7088-B (PECB, 2002)); *See also Kitsap County*, Decision 11869-A (PECB, 2014) ("Neither party appealed the Examiner's Findings of Fact, therefore, those Findings of Fact are verities on appeal").
[114] Decision 7210-A and 7211-A (PECB, 2001).
[115] *Id.* (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990)); *see also Kiona Benton School District*, Decision 11563-A (EDUC, 2013); *City of Edmonds*,

emphasized that this is the appropriate standard as recently as May, 2016: "Because the Corrections Guild failed to identify in its notice of appeal the specific findings of fact in error, all findings of fact are verities on appeal."[116] In that case, the party had described the contested findings in its brief, but had neglected to explain them in its notice of appeal.[117] Given these cases, it is clear that PERC's standard of review requires both that the party address the contested findings in its notice of appeal, and produce timely briefing discussing the issues.

It is an undisputed fact in this situation that despite the County filing two separate briefs (an "appeal" brief and a "reply to appeal" brief), the Commission refused to consider either brief because neither met the requirements in WAC 391-45-350. In particular, the Commission specifically noted that it has "not considered the employer's untimely appeal brief or 'response' brief because neither was filed in compliance with the rules."[118] On appeal, in terms of argument, all the Commission had to consider was the County's two-page pleading detailing what findings of fact, conclusions of law, and aspects of the original Order the County found to be in error, and the Guild's response brief to the County's appeal.[119]

Decision 8798-A (PECB, 2005) ("Unchallenged findings of fact are considered verities on appeal").

[116] *King County*, Decision 12451-A (PECB, 2016) (citing *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 347 (2014)).

[117] *Id.*

[118] *Kitsap County*, Decision 12163-A (PECB, 2015) at 6.

[119] In its decision, the Commission indicated that it considered the "briefing before the examiner;" however, WAC 391-45-390, specifies that on appeal the Commission is only to consider "the record and any briefs or arguments *submitted to it*" (emphasis supplied)

In the complete absence of any specific arguments from the County detailing why the Examiner's findings were in error, legally it is not possible for the County to carry the burden of proof imposed on it to have the Examiner's factual determinations set aside by the Commission on appeal. For the Commission to have effectively taken on that burden of proof, on the County's behalf, by conducting its own review of the record and relying on any arguments made by the County in its briefing in front of the hearing examiner constitutes an error of law and is arbitrary and capricious.

There are several problems with the Commission's decision necessitating this Court to set aside its Order under the APA. First, the Commission's own case precedent is clear that the appealing party has the burden of demonstrating that specific findings are not supported by the record. In the absence of such a showing, the findings are presumed to be correct and considered verities on appeal, as consistent with the agency's own rulings on this topic. In *Brinnon School District*,[120] the Commission has previously determined that an appealing party cannot carry its burden of proof when no arguments are submitted to the Commission explaining why the factual determinations by the examiner were in error. In this case, the Commission has offered no explanation or rationale justifying a deviation herein.

Second, unlike the structure of the National Labor Relations

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in ruling on the appeal, which would not include earlier briefing submitted to the hearing examiner.

[120] Decision 7210-A and 7211-A (PECB, 2001).

Board ("NLRB")[121], PERC is required to "maintain an impartial role in all proceedings pending before the agency,"[122] and it is the responsibility of parties to a ULP proceeding to present their own case or defense and satisfy their respective burdens of proof.[123] In the absence of any argument from the County in support of its appeal demonstrating why the Examiner's findings are not supported by substantial evidence, it is impossible for the County, as the appealing party, to satisfy this burden. However, for all intents and purposes, the Commission has effectively taken up the mantle on the County's behalf by conducting its own independent review of the record and engaging in a wholesale substitute of factual findings, which were contrary to specific findings made by the Examiner. Such an act compromises the agency's mandated neutrality by stepping in for a derelict party who was unable to comply with the agency's rules in submitting a timely appeal brief and then conducting its own review of the record to justify vacating the Examiner's original Order.

Either of the Commission's errors of law – failing to follow the mandated substantial evidence standard, or failing to hold the appealing party to its burden of proof – more than justify this court vacating the Commission's decision. Although the Commission's error of law in vacating the Examiner's determination of a ULP in this case is, in and of itself, a sufficient basis to overturn its decision; these procedural

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[121] *See* 29 CFR §§ 102.9-.59
[122] WAC 391-08-630.
[123] *See* WAC 391-45-270.

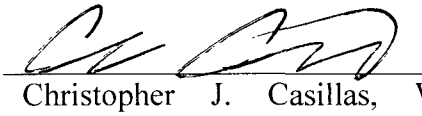
violations are necessarily fatal to the actions of the Commission and necessitate reversal under the APA. The APA does not permit the Commission to somewhat callously set aside its own rules and procedures because it simply had a different view of the factual record than that of the Hearing Examiner. In not following those rules and articulating why the Examiner's findings were not supported by substantial evidence, the Commission committed reversible error necessitating a reinstatement of the Examiner's original findings and Order.

V. CONCLUSION

Based on the foregoing, the Guild respectfully requests the Commission's Order be vacated and the Hearing Examiner's original Order reinstated.

RESPECTFULLY SUBMITTED this 21st day of July, 2016, at Seattle, WA.

CLINE & CASILLAS



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CERTIFICATE OF SERVICE

I certify that on July 21st, 2016, I caused to be served via Electronic Mail and U.S. Mail true and accurate copies of the foregoing RESPONDENT'S OPENING BRIEF and this *CERTIFICATE OF SERVICE* on the parties below:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of July, 2016, at Seattle, Washington.

CLINE & CASILLAS

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